

# In the Supreme Court of the United States

OCTOBER TERM, 1968

---

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES D. KNOX

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF TEXAS

---

## JURISDICTIONAL STATEMENT

---

### OPINION BELOW

The memorandum and order of the United States District Court for the Western District of Texas (Appendix A, *infra*, pp. 8-9) is not yet reported.

### JURISDICTION

On July 24, 1968, the district court entered an order dismissing the indictment charging appellee with violation of 18 U.S.C. 1001 on the ground that prosecution under that statute is barred by his privilege against self-incrimination. Notice of appeal to this Court was filed on August 21, 1968. The jurisdiction of this Court rests on Section 3731 of Title 18, United

States Code, which authorizes the government to appeal directly from a decision sustaining a motion in bar, when the defendant has not been put in jeopardy. See *United States v. Blue*, 384 U.S. 251; *United States v. Murdock*, 284 U.S. 141.

#### STATUTE INVOLVED

18 U.S.C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

#### QUESTION PRESENTED

Whether this Court's decision in *Marchetti v. United States*, 390 U.S. 39, which bars prosecution for failure to comply with the registration requirements of the wagering tax laws upon a proper claim of the privilege against self-incrimination, also requires dismissal of an indictment charging one who voluntarily registered with knowingly and willfully making false statements in his registration forms.

#### STATEMENT

Appellee James Knox was indicted, together with a number of other defendants, in a multi-count indict-

ment. The first four counts charged Knox with violations of 26 U.S.C. 7203 based on the failure to file special tax returns and applications for registry as required by 26 U.S.C. 4412 and 4901, for the fiscal years 1964 and 1965; counts five and six charged him with violations of 18 U.S.C. 1001 stemming from alleged false statements of material fact contained in a special tax return and in a supplemental special tax return filed on October 14 and October 15, 1965, respectively.<sup>1</sup> These latter two counts alleged that Knox subscribed to the returns and applications (Internal Revenue Form 11-C) under the penalties of perjury and that he knew at the time of filing that the forms misrepresented "the number of employees and/or agents engaged in receiving wagers in his behalf."

Appellee moved to dismiss the indictment on the ground that the wagering tax laws and the regulations promulgated thereunder were invalid in that they required the registrant to give information that would incriminate or tend to incriminate him. This contention was also made with regard to "all other inter-related statutes" upon which the charges against him were predicated. In response, the government asserted its intention to prosecute only under counts five and six of the indictment, recognizing that prosecution under the first four counts was barred by this Court's decisions in *Marchetti v. United States*, 390 U.S. 39, and *Grosso v. United States*, 390 U.S. 62, and, as to the fifth and sixth counts, it opposed dismissal.

---

<sup>1</sup> The first six counts of the indictment are reprinted in Appendix B, *infra*, pp. 10-14.

Relying upon *Marchetti* and *Grosso*, the district court dismissed all counts of the indictment—including those charging violations of Section 1001. It held that Knox could not be prosecuted for his “failure to answer the wagering form correctly” since his “constitutional privilege against self-incrimination would have prevented prosecution for failure to answer the form in any respect” (Appendix A, *infra*, p. 9).

#### THE QUESTION IS SUBSTANTIAL

1. In dismissing the counts charging false statements under 18 U.S.C. 1001, the district court seriously misinterpreted the *Marchetti* and *Grosso* decisions. This Court there held only that the proper assertion of the privilege against self-incrimination bars prosecution for failing to comply with the registration and reporting requirements of the wagering tax laws; neither directly nor by implication do these rulings suggest that one who does comply may, with impunity, do so falsely. As the Court said in *Marchetti, supra*, 390 U.S. at 61:

We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold *only* that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for *failure* to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is *otherwise outside the privilege's protection*, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes. [Emphasis added.]

2. The district court's ruling was plainly contrary to this Court's decision in *Dennis v. United States*, 384 U.S. 855. In that case the petitioners were charged with conspiring, in the years 1949-1955, to obtain the services of the National Labor Relations Board on behalf of the union of which they were officers by filing affidavits falsely denying their Communist Party affiliations in an attempt to satisfy the requirements of Section 9(h) of the Taft-Hartley Act. Congress had repealed Section 9(h) and had substituted for it Section 504 of Title 29, which made it a crime for any member of the Communist Party to hold union office. Section 504 had thereafter been held unconstitutional as a bill of attainder in *United States v. Brown*, 381 U.S. 437. Relying on the *Brown* decision, the *Dennis* petitioners asked this Court to reconsider the constitutionality of Section 9(h), the validity of which had been sustained in *American Communications Assn. v. Douds*, 339 U.S. 382. In declining to reach that constitutional issue, the Court said (384 U.S. at 865-866):

\* \* \* [P]etitioners are in no position to attack the constitutionality of § 9(h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it—a purported compliance with the stat-

ute designed to avoid the courts, not to invoke their jurisdiction.

It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. Ample opportunities exist in this country to seek and obtain judicial protection. There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they now seek to challenge. \* \* \*

The *Dennis* rationale clearly governs the instant case. Thus, the appellee here, with "cynical and fraudulent" intent, sought to evade the penalty imposed on those who fail to comply with the requirements of Section 4412 by providing the government with false information. Granting that he cannot be punished for having failed to register under Section 4412 (just as the petitioners in *Dennis* sought to contend that they could not have been punished for failing to file the affidavits required by Section 9(h)), it is nonetheless true that, having elected "such a course as a means of self-help [he] may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional." *Dennis v. United States*, 384 U.S. at 867. Indeed, the present case is an even stronger one than *Dennis* for the application of this principle because it has long been held that the privilege against self-incrimination may be waived by failure to assert it in a timely and proper manner. See,

*e.g.*, *Rogers v. United States*, 340 U.S. 367, 372-375;  
*Brown v. Walker*, 161 U.S. 591, 597.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.<sup>2</sup>

ERWIN N. GRISWOLD,  
*Solicitor General.*

FRED M. VINSON, Jr.,  
*Assistant Attorney General.*

JEROME M. FEIT,

CHARLES RUFF,

*Attorneys.*

OCTOBER 1968.

<sup>2</sup>If the Court agrees with our submission that the issue raised in this appeal is plainly governed by the decision in *Dennis v. United States*, *supra*, it may deem this case appropriate for summary reversal.

## APPENDIX A

### UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

(Criminal Number 67-80-A)

UNITED STATES OF AMERICA vs. JAMES D. KNOX

#### MEMORANDUM AND ORDER

Came on this day for consideration by this Court, the motion of the defendant, James D. Knox, in the above styled and numbered cause, applying to this Court for a dismissal of the indictment, which the parties agreed to have decided without oral argument.

The Court grants the dismissal on the authority of *Marchetti v. United States*, 390 U.S. 40 (1968) and *Grosso v. United States*, 390 U.S. 63 (1968).

The indictment alleges that the Defendant violated Title 18, United States Code, Section 1001 (1964) by wilfully and knowingly making a false statement on Internal Revenue Form 11-C, Special Tax Return and Application for Registry-Wagering.

In general, the *Marchetti* and *Grosso* cases held that the privilege against self-incrimination bars prosecution under the federal wagering tax statutes. This case is controlled specifically by *Grosse* [sic] which held that the petitioner there could not be convicted of conspiracy to evade payment of the excise tax on wagering "if the constitutional privilege would properly prevent his conviction for willful failure to pay it." *Id.* at 70. Similarly, the indictment in this case is based



on the defendant's alleged failure to answer the wagering form correctly, and the constitutional privilege against self-incrimination would have prevented prosecution for failure to answer the form in any respect.

It is therefore ORDERED, ADJUDGED and DECREED that the motion be, and is hereby, granted.

Signed at Austin, Texas, this 24th day of July, 1968.

JACK ROBERTS,  
*United States District Judge.*

## APPENDIX B

### UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

(Criminal No. 67-80-A, Vio. 18 U.S.C. 1001, 26  
U.S.C. 7203)

UNITED STATES OF AMERICA v. JAMES D. KNOX, GEORGE  
MARTIN, KEITH J. NICHOLS, BUFORD H. FOSTER,  
CURTIS D. BRIDGES, CARL B. MOHR

#### THE GRAND JURY CHARGES

That during the fiscal period beginning on or about July 1, 1964, and ending June 30, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined in Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Sections 4412(a), 4412(b), and 6011(a) of the Internal Revenue Code and the applicable regulations to make a return by registering with the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, by filing a Special Tax Return and Application for Registry-Wagering, Form 11-C; that prior to engaging in said business he did knowingly and wilfully fail to make such return in that he failed to register with and make said Special Tax Return and Application for Registry-Wagering, Form 11-C, to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT TWO

That during the fiscal period beginning on or about July 1, 1964, and ending June 30, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined by Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Section 4901 of the Internal Revenue Code to pay to the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, the special occupational tax imposed by Section 4411 of the Internal Revenue Code; that prior to engaging in said business he did knowingly and wilfully fail to pay said special occupational tax to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT THREE

That during the fiscal period beginning on or about July 1, 1965, and continuing until on or about October 13, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined in Section 4421(1) of the Internal Revenue Code; that prior to engaging in said business he was required by Sections 4412(a), 4412(b) and 6011(a)

of the Internal Revenue Code and the applicable regulations to make a return by registering with the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, by filing a Special Tax Return and Application for Registry—Wagering, Form 11-C; that prior to engaging in said business he did knowingly and wilfully fail to make such return in that he failed to register with and make said Special Tax Return and Application for Registry—Wagering, Form 11-C, to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

#### COUNT FOUR

That during the fiscal period beginning on or about July 1, 1965, and continuing until on or about October 13, 1965, JAMES D. KNOX, who was a resident of the City of Pasadena, State of Texas, did engage in the business of accepting wagers on sporting events as defined by Section 4421(1) of the Internal Revenue Code; that prior to engaging in said he was required by Section 4901 of the Internal Revenue Code to pay to the District Director of Internal Revenue for the Internal Revenue District of Austin, at Austin, Texas, within the Austin Division of the Western District of Texas, the special occupational tax imposed by Section 4411 of the Internal Revenue Code; that prior to engaging in said business he did knowingly and wilfully fail to pay said special occupational tax to said District Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; Title 26, United States Code, Section 7203.

COUNT FIVE

That on or about October 14, 1965, JAMES D. KNOX did willfully and knowingly make and cause to be made a false and fraudulent statement and representation of a material fact in a matter within the jurisdiction of the Internal Revenue Service of the United States Treasury Department, an agency of the United States of America, in that on an Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry-Wagering, which was subscribed under the penalties of perjury and filed with the District Director of Internal Revenue for the Internal Revenue District of Austin, Austin, Texas, within the Western District of Texas, the defendant JAMES D. KNOX did state that "I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete."; whereas in truth and fact, as the said JAMES D. KNOX then knew, all of the statements contained in said Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry-Wagering, were not true, correct, and complete, in that the number of employees and/or agents engaged in receiving wagers in his behalf were misrepresented and understated, in that the number, name, special stamp number, street address, and city and state of employees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted from said Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry-Wagering; in violation of Title 18, United States Code, Section 1001.

## COUNT SIX

That on or about October 15, 1965, JAMES D. KNOX did willfully and knowingly make and cause to be made a false and fraudulent statement and representation of a material fact in a matter within the jurisdiction of the Internal Revenue Service of the United States Treasury Department, an agency of the United States of America, in that an Internal Revenue Service Form 11-C, identified as a Supplemental Special Tax Return and Application for Registry-Wagering, which was subscribed under the penalties of perjury and filed with the District Director of Internal Revenue for the Internal Revenue District of Austin, Austin, Texas, within the Western District of Texas, the defendant JAMES D. KNOX did state that "I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete."; whereas in truth and in fact as the said JAMES D. KNOX then knew, all the statements contained in said Internal Revenue Service Form 11-C, identified as a Supplemental Special Tax Return and Application for Registry-Wagering, were not true, correct, and complete, in that the number of employees and/or agents engaged in receiving wagers in his behalf were misrepresented and understated in that the number, name, special stamp number, street address, and city and state of employees and/or agents engaged in receiving wagers in the said JAMES D. KNOX's behalf had been omitted from said Internal Revenue Service Form 11-C, identified as a Supplemental Special Tax Return and Application for Registry-Wagering; in violation of Title 18, United States Code, Section 1001.